

8 Official Opinions of the Compliance Board 103 (2012)

- ◆ **Meeting** – *Determined not to be a meeting:*
 - ◇ In the absence of a quorum, circulation of form requesting agenda items or staff actions

*Topic headings correspond to those in the Opinions Index (2010 edition) at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

August 3, 2012

Re: Board of County Commissioners of Carroll County/ Cornelius M. Ridgely and Bonnie Grady

We have consolidated and considered the complaints of Cornelius M. Ridgely and Bonnie Grady that the Board of County Commissioners of Carroll County (“Commissioners”) have violated, and continue to violate, the Open Meetings Act (the “Act”) through their exchange of an “Action Authorization Form,” also known as the “goldenrod form,” among themselves and their chief of staff. We have also considered the various other concerns stated in these complaints.

In Complainants’ view, the Commissioners use the goldenrod form as a means of intentionally deliberating on public business out of the public eye and thereby evading the goal of the Act that “public business be performed in an open and public manner.” *See* Annotated Code of Maryland, State Government Article (“SG”) § 10-505. In the Commissioners’ view, the form is simply a means of placing items on the agenda for its sessions and is legal so long as it is circulated to the commissioners “individually,” not in the presence of a quorum. The County Attorney has provided us with two examples of the use of the goldenrod forms.

As we explain below, we conclude that the Commissioners did not violate the Act by circulating the goldenrod form among themselves on the two occasions presented to us and that they did not meet secretly on the topics proposed on those forms.

Facts and allegations

The Commissioners adopted the goldenrod form during their February 21, 2011 meeting. The form contains blank spaces for three types of proposals. The first section is labeled “Proposal for Agenda Item (1 signature needed)” and has spaces for “Agenda Date,” “Topic,” and “Notes.” The second section, labeled “Proposal for Closed Meeting (3

signatures needed),” has spaces for “Meeting Date,” “Closed For,” and “Notes.” The third section, labeled “Proposal for Chief of Staff/Staff Directive (3 signatures needed- Attach Detail),” has spaces for “Date required,” “Directed to,” “Topic,” and “Notes.” The Board of Commissioners is a five-member body, so three members constitute a quorum.

The first form of the two provided to us shows that on April 17, 2012, Commissioner Rothschild submitted a “Proposal for Agenda Item” for a topic specified as “To instruct County Attorney to file petition to oppose redistricting.” Although only one signature is needed to put an item on the agenda, three commissioners signed the form, each on a different date. On the date of the meeting for which that discussion was scheduled, the County Attorney had already drafted a petition. At the meeting, a commissioner stated that the item was on the agenda because “there was some question about whether three of us wanted to do something about this....” Complainant Ridgely infers from those facts that the three commissioners had discussed the possible petition by “one-on-one conversation, e-mail, or . . . a circulated memo . . .” He further states that he has been informed that the commissioners have used goldenrod paper to communicate secretly, and that county staff in the past have used color-coded paper to convey messages about which development projects should be fast-tracked through the development review process. The County Attorney states that he had prepared a draft petition in advance because the filing deadline was the day of the meeting and that the public meeting that day was the only time a quorum of commissioners had discussed the topic. At that meeting, the commissioners discussed the topic at length, and the three commissioners who had signed the form voted in favor of instructing the County Attorney to file the petition that day.

The second form, the subject of Complainant Grady’s complaint, is signed by one commissioner and states a request for an agenda topic specified as “Building Use Policy – Employee Groups (Discussion).” The Commissioners addressed a pre-prepared written policy on that topic at their May 17, 2012 meeting. Complainant Grady states her concern, raised by a commissioner’s reference on May 17 to an earlier “discussion” on the matter, that the Commissioners had already discussed the written policy behind closed doors without keeping minutes or following the procedures in the Act for excluding the public.¹ The County Attorney responds that he had drafted the policy in advance because he had perceived a need for it, that he distributed it to the Commissioners, that the commissioner’s mention of a “discussion” referred to a conversation between that commissioner and the County Attorney, and that the commissioners’ only

¹ The complaint also poses a number of questions concerning the generation of the draft policy, the identity of the employees who drafted it, and the existence of various documents pertaining to its distribution to the Commissioners. We only have the authority to address documents that are required to be kept by the Act. We do not have the authority to address Public Information Act matters.

discussion, as a quorum, on the matter occurred in public meetings. At the May 17 meeting, the Commissioners proposed changes to the draft, took comments and questions from members of the public, and responded to one comment by tabling the matter for later decision.

Both Complainants question the use of the goldenrod forms generally. Complainant Ridgely specifically questions the “Proposal for Closed Meeting” section; Complainant Grady expresses concern that the “Proposal for Chief of Staff/Staff Directive is used as a way of governing secretly.

Discussion

The Act requires a public body to hold its meetings in open session, unless the Act expressly permits otherwise. Annotated Code of Maryland, State Government Article (“SG”) § 10-505. A “meeting” for purposes of the Act occurs when a quorum of the public body convenes to consider or transact public business. SG § 10-502(g). As explained in 94 *Opinions of the Attorney General* 161, 173 (2009), other laws might require that public business be addressed only in a meeting, but the Act does not.² Rather, the Act “simply establishes rules that apply when a meeting occurs.” *Id.*

The facts before us do not establish that a quorum of the Commissioners met secretly on either of the matters stated on the two goldenrod forms before us. The signatures on the first form bear three different dates, and the commissioner’s reference to “some question” about “whether three of us wanted to do something about [the redistricting matter]” does not mean that they discussed the matter either in the presence of an actual quorum or in the context of a constructive, or “walking” quorum. See 8 *OMCB Opinions* 56, 59-60 (2012) (discussing cases in which courts held that public bodies violated open meetings laws by using small overlapping gatherings of their members or cycling members through a meeting in order to exclude the public). In any event, the cases and authorities on the avoidance of open meetings laws through that device turn on the public body’s intent to evade the Act, a fact we do not assume. The second form bears only one signature, and the County Attorney’s response establishes that the “discussion” to which a commissioner had referred did not occur in the presence of a quorum of the Commissioners.

We turn to the Complainants’ other concerns about the Commissioners’ use of the goldenrod form. As to Complainant Ridgely’s concern about the “closed meeting” section of the form, it does not appear that the Commissioners use the form as a substitute for the Act’s closing procedures. If a public body were to use such a form for that purpose, that

² The opinion addressed Article 25, § 5, which generally requires that the meetings of county commissioners be public meetings, permits commissioners to hold closed “executive sessions,” and provides that “no ordinance, resolution, rule, or regulation shall be finally adopted at such an executive session.” The opinion considers the effect of the Open Meetings Act on that earlier provision.

public body would violate the Act by failing to vote and generate the necessary written statement in public. *See* SG § 10-508(d).

As to Complainant Grady's concern that the Commissioners are governing by the circulation of a form on which they consider "actions," rather than by deliberations in public meetings, we refer to our explanation above that Maryland's Open Meetings Act does not control the method by which a public body reaches its decisions. *See also* 1 *OMCB Opinions* 107, 108 (1994) (finding that no quorum had met; commenting that the nature of the decision made by that public body was "evidently . . . such that, under the [applicable charter] and applicable practice, [the decision could be made] through a consensus process rather than a meeting."). Other states have enacted such laws -- for example, public bodies in Oklahoma may not decide actions or vote by electronic or telephonic communications,³ – but Maryland's Open Meetings Act does not contain such a provision.

Conclusion

We conclude that the complained-of conduct did not occur in the presence of a quorum, was not subject to the Act, and did not violate the Act.

Open Meetings Compliance Board

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³ 25 Okl. St. § 306 provides: "No informal gatherings or any electronic or telephonic communications, except teleconferences as authorized . . ., among a majority of the members of a public body shall be used to decide any action or to take any vote on any matter."